SALES OF MERCHANDISE IN BULK.

*An Act to Prevent the Fraudulent Sale in Bulk of Merchandise, or Any Portion Thereof, Otherwise than in the Ordinary Course of Trade.*—Acts Extra Session 1902–3, p. 518.

*Editor Virginia Law Register:*

This statute, which might have been of great commercial importance, seems to have been so imperfectly drafted as to leave the subject in confusion, both as to what was intended, and as to what is accomplished by the act.

*As to the intention of the act.* In some of the states the courts, without legislative authority, have held sales in bulk of stocks of merchandise, for cash, to be constructively fraudulent and void, where the purchaser knows that the vendor is indebted, and does not see that the purchase money is applied to the payment of the vendor's creditors, on the ground that the natural tendency of such transactions is to assist the vendor in a conversion of his goods, which can be easily reached by execution, into money, which can be easily concealed from creditors.

Such is the rule of decision in Texas and other states. See *Elser* v. *Garber*, 6 S. W. 562; *Wills* v. *Yates*, 12 S. W. 233.

In other states, the legislature has provided that in such transactions the vendee shall see to the application of the purchase money to the payment, ratably, of the vendor's creditors, which are to be ascertained in a manner similar to that provided in the Virginia statute. See *McDaniels* v. *Connelly Shoe Co.*, 60 L. R. A. 947. There is a strong commercial sentiment, if not a clear principle of reason and justice, in favor of affording protection to the wholesale dealer who has trusted the retail dealer by selling to him on credit and enabling him to start or maintain a business, against having the retail dealer convert his stock into money, which he may put in his pocket and walk out, without a word of notice to his creditor, the wholesale dealer. To allow such transactions is to ignore the important circumstance and implied understanding which naturally entered into the contract of sale, that the goods were to be used by the vendee to carry on his business, in the usual course of trade, offering not only the assurance to the wholesale dealer that through this course of dealing he would secure continuing trade, but would also, through it, have the means of obtaining payment for the goods entrusted to the retail dealer.

Our legislature has forbidden, as against the creditor who sold them, the claiming of a homestead exemption in goods which have not been paid for; the present constitution prohibits claiming a homestead exemption in a stock of merchandise, and the Court of Appeals has constantly declared deeds of trust given on stocks of merchandise to be conclusively fraudulent and void; yet the Court of Appeals and the legislature have heretofore declined to protect the creditor-merchant against the sudden conversion of the retail dealer's goods into money, by sale out of the ordinary course of trade, which even more facilitates fraud; and which the Supreme Court of Texas, under a statute of fraululent conveyances which is identical with

the Virginia statute on the same subject, has repeatedly declared to be constructively fraudulent and void, as against the vendor's creditors.

*As to the effect of the act.* Without quoting the act in full, it is sufficient for present purposes to recall its principal requirements, in case of a merchant intending to sell his stock in bulk, which are that he shall make and deliver to the purchaser a true inventory of his stock and of its value; that he shall make likewise a true list of all of his creditors, giving their addresses and the amount due each, and that the seller and purchaser shall give to each creditor, in person or by registered mail, ten days notice of the terms of sale, payment, etc. The penalty for failure to comply with the detailed requirements of the act is as follows: "Such sale shall *prima facie* be presumed to be fraudulent and void as against the creditors of such seller, and the merchandise in the hands of such purchaser, etc., shall be liable to such creditors."

In the other states referred to, the courts, or the legislatures, have courageously and consistently said that such transactions are *conclusively* presumed to be fraudulent, and are void. But our legislature has shrinkingly said that they shall be *prima facie* fraudulent (which implies to the lawyer and judge that the inference of fraud may be overcome by proof) and has inconsistently followed the *prima facie* presumption by a conclusive result—"*shall* be liable to such (the vendor's) creditors."

Finally, the act does not provide for an application of the purchase money to the payment of the vendor's creditors, and though they may all have been notified, and though every detail of the statute may have been complied with, the sale may be perfected in the presence of the convened creditors, who must stand supinely by while the vendor may receive the purchase price, and may walk away with every dollar of the money in his pocket. Should not the approaching legislature make this act fuller and more explicit?

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NOTE.—While we agree generally with our correspondent that the scope of this act might have been made broader, yet from a practical standpoint, it is doubtless sufficient in its present form to remedy the evil at which it was directed and to block this form of fraud, in that, in effect, it forbids outright sales of merchandise in bulk, or, if they are made and consummated, it will protect the rights of the creditors of the vendor. Imagine a prospective purchaser of such a stock confronted with the provisions of the act. He, of course, would demand a valid title, and to this end must adopt some plan by which the vendor's debts, *quoad* the stock, will be paid. He must take some course which will give assurance of *bona fides* and carry out the intention of the act. Otherwise, even the *prima facie* burden must be too heavy for him, and he will, if well advised, abandon the purchase and thus leave the vendor to dispose of his stock in the regular course of trade. We think, therefore, as we have said, that while the suggestions made are pertinent, the obstacles, placed by the statute in the way of

parties inclined to violate the statute, are sufficiently formidable to discourage a serious attempt. The brand of *prima facie* fraud in such cases is, as in the majority of cases involving the transfer of property between husband and wife, equal to conclusiveness, and the courts would hardly be satisfied with a degree of proof intended to rebut this presumption, which would not at the same time protect the rights of the creditors.

An important feature of the question is the constitutionality of the act. In *Re F. M. Davis & Co.*, 10 Am. Bcy. R. 189, a similar act of the Ohio legislature was pronounced void, as depriving one of property and liberty of contract without due process of law. The opinion was by a referee in bankruptcy, but was approved by the United States District Court for the Northern District of Ohio. The Ohio Act, however, while similar to that of Virginia, is not the same. It pronounces a sale of an entire stock in bulk to be *"fraudulent and void"* unless some thirty requirements be complied with. Upon this point says the referee: "It will further be observed that the sale is declared to be void and that the statute does not, as do several of the statutes of sister states upon this subject, simply lay down certain rules of evidence from which fraud is to be presumed unless rebutted." The Virginia Act is of the latter class, but if, as above indicated, it works a practical inhibition of such sales, the reasoning of the referee would seem to embrace both, and, if sustained, one would fall with the other. In any event the point is worthy of careful attention. See also *Matter of Farrell*, 10 Am. Bcy. R. 341. *Young* v. *Commonwealth*, reported in this number, is very broad in its declaration of the right of the citizen to enter into *all* contracts which may be proper, necessary and essential to his carrying out a lawful purpose.—EDITOR VIRGINIA LAW REGISTER.